No. 12,880

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GUY F. ATKINSON CO., (a Corporation), and J. A. JONES CONSTRUCTION CO., (a Corporation),
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT GUY F. ATKINSON CO. AND J. A. JONES CONSTRUCTION CO.

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SUPPLEMENTAL STATEMENT OF THE CASE.

The statement of the case contained in the Board's brief (pp. 2-8) is correct insofar as it goes, but it omits mention of an important circumstance which Respondent considers to be basic to the correct determination of the case.

This case is one of the first in which the National Labor Relations Board has undertaken to exercise

jurisdiction over the building and construction industry. Under the original National Labor Relations Act, the Board, as a matter of administrative policy, refused to extend the benefits, burdens and sanctions of the Act to that industry. As expressed by the Board in its Decision, Order and Direction of Election in the *Matter of the Plumbing Contractors Association of Baltimore, Maryland, Inc.,* April 2, 1951, 93 NLRB No. 177, footnote 12, 27 LRRM 1516:

> "The Board did not, under the Wagner Act, customarily assert jurisdiction over the building and construction industry. See *Johns-Manville Corporation,* 61 NLRB 1."[1]

The matter was stated in this proceeding at the oral argument before the Board in the following terms (R. 107-108):

> " 'Chairman Herzog: I do not know how other counsel are going to feel about that. I am not stating what my own final position is, but——
>
> " 'Let me ask you this: If this was a Wagner Act issue, although coming up in 1949 before us, **certain principles enunciated by the old Board under the Wagner Act would be sufficient to protect your client against liability?**[2]
>
> " 'Mr. Johnson: That is the way we view that.
>
> * * *
>
> " 'Mr. Murdock: Under Section 102 of the Taft-Hartley Act, and **due to the fact that under the Wagner Act this Board never asserted juris-**

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[1]See, also, R. 54, footnote 15; *In the Matter of Brown & Root* (1943), 51 NLRB 820; *In the Matter of Brown & Root, Inc.* (1948), 77 NLRB 1136.

[2]Throughout this brief, emphasis is ours unless otherwise noted.

diction over the construction industry, does that fact distinguish this case?

"'Mr. Johnson: Yes, I think it does. I think you have put your finger right on the essential point.

"'Mr. Murdock: **It seems to me that one of the very important aspects of the case is that the Board never asserted jurisdiction over the construction industry under the Wagner Act** and then, if we come to the conclusion that this contract was entered into subject to the Wagner Act, what then?

"'Mr. Johnson: That is the very point, Senator.'"

This refusal to assert jurisdiction over the building and construction industry is a fundamental operative fact which cannot be glossed over or brushed aside. The policy meant that insofar as this entire industry was concerned *there was no Federal law in effect regulating and stabilizing labor relations in the industry.* Under the original Act, as under the amended Act, the Board had important, day-to-day functions to perform in connection with labor relations in the industries over which it asserted jurisdiction. It maintained numerous regional and subregional offices throughout the country. Through these offices it not only received and investigated charges of unfair labor practices, held hearings in connection therewith and issued authoritative decisions and remedial orders, but it also received and investigated representation petitions, determined appropriate bargaining units, held elections and issued certificates of majority status.

The policy of abstention adopted by the Board insofar as the building and construction industry was concerned meant that none of this elaborate machinery for stabilizing labor relations was made available to management and labor in that industry. If an individual or a union representative in the industry considered that he or the union was the victim of an unfair labor practice and went to a regional or subregional office of the Board to complain, he was told that the Board did not take jurisdiction over the building and construction industry, and that the complaint would not be processed. If a building and construction trades union wanted to establish its representative status, or if a construction employer questioned the majority status of a union or the appropriateness of the unit it claimed to represent, and if either appealed to the Board for guidance and assistance, he was told that his petition would not be entertained. Neither the facilities of the Board, nor the protection of the Act, was extended to a construction employer or employee.

The result of all this was that none of the vexing problems connected with the determination of representative status in the building and construction industry were ever considered or settled by the Board (see *infra,* pp. 26-32). Labor and management in this vast and complicated industry were left to work out their problems without the aid of the Board or its facilities. Thus, the parties to the closed-shop contract of August 16, 1947, which the Board held in this proceeding to be invalid because it did not cover an appropriate bargaining unit, *were denied the use of*

the statutory facilities for determining such unit in advance of the execution of the contract.

As pointed out by the Board in its Decision and Order (R.50-51) and in its brief (p. 2, n. 3), the contract of August 16, 1947, was entered into during the period between the enactment date and the effective date of the amended Act, and therefore its availability as a substantive defense is to be determined under the provisions of Section 102 of the amended Act (61 Stat. 136, 29 U.S.C. Supp. III, secs. 151, *et seq.*). That section provides as follows:

> "Sec. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto."

In view of the provisions of Section 102, the discharge of Chester R. Hewes pursuant to the require-

ments of the closed-shop contract of August 16, 1947, was not an unfair labor practice unless it would have been an unfair labor practice if it had taken place prior to the effective date of the amended Act. At that time, as we have shown, it was the fixed policy of the Board not to assert jurisdiction over the building and construction industry, either for the purpose of preventing unfair labor practices or for the purpose of assisting in the determination of appropriate bargaining units. Therefore, the Decision and Order of the Board in this case constitutes a determination that the Board may impose the unfair labor practice sanctions of the Act upon labor and management for the selection of an "inappropriate" bargaining unit even though such selection was made at a time when the parties were being denied any assistance from the Board in connection therewith and when they had been led to believe, by the Board itself, that they were free to proceed without regard to the unfair labor practice provisions of the Act.

The implications of such a determination are far-reaching and grave. For example, the Board, by a 3 to 2 decision, has recently reaffirmed its policy of not asserting jurisdiction over the hotel industry. *Hotel Association of St. Louis,* January 17, 1951, 92 NLRB, No. 215, 27 LRRM 1243.

In the *Hotel Association* case the majority of the Board said (27 LRRM 1244):

> "We have carefully reexamined the Board's policy of not exercising jurisdiction over the hotel industry, in the light of the record and of the position of the parties as set forth in the briefs and oral argument in this case. We do not

> believe that a settled policy, indorsed by all those members of Congress who have recorded an opinion on the subject, should be lightly overturned by the action of this administrative Board."

In a vigorous dissent, the minority members said (27 LRRM 1246):

> "It is a well established principle of statutory construction that exemptions from legislation such as ours must be strictly construed. At least they should be expressed—and expressed in the statute by the Congress. We see no justification for this Board to write an exemption of the hotel industry into the Act, particularly in a time of national emergency and national defense effort; that in effect is what the decision of the majority does."

If hereafter the same Board, or a differently constituted Board, could legally and constitutionally reverse this policy decision and invalidate contracts executed, and treat as unfair labor practices acts performed, during the period while the original policy was in effect, it would be within the power of the Board to disrupt labor-management relationships in the entire industry. Further, even while the present policy of abstention as to the hotel industry continues in effect, the possibility of the exercise of such arbitrary and inequitable power would create intolerable conditions of uncertainty and instability in labor relations in the industry, contrary to the "primary objective of Congress in enacting the National Labor Relations Act" *(Colgate-Palmolive-Peet Co. v. National Labor Relations Board* (1949), 338 U.S. 335, 362).

SUMMARY OF ARGUMENT.

Respondent contends that the Board has no authority or power, under the National Labor Relations Act, to invalidate a collective bargaining agreement on the ground that the unit covered is inappropriate or to treat as an unfair labor practice action taken pursuant to such an agreement, where the agreement was executed and the action taken at a time when the Board was refusing to exercise jurisdiction over the industry involved. It contends, further, that, assuming the Act grants such authority and power, the exercise thereof constitutes a denial of due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

In support of these contentions Respondent submits as follows:

1. The closed-shop contract of August 16, 1947, covered a collective bargaining unit consisting of all operating engineers then employed or thereafter to be employed on the Hanford Engineering Works Project by Respondent, which was a joint venture composed of members of The Associated General Contractors of America, Inc. The agreement was made in good faith with the labor organization which was, in actual fact, the historically recognized and duly authorized collective bargaining representative of a majority of the operating engineers employed by members of The Associated General Contractors of America operating within the area in which the project was located. Since the Board, at and before the time the agreement was made, was withholding from the parties the statutory facilities for the determina-

tion by it of an appropriate unit, the agreement cannot be invalidated by an *ex post facto* determination by the Board that the unit selected by the parties was "inappropriate."

2. The retroactive application of the change in the Board's administrative policy of abstaining from the exercise of jurisdiction over the building and construction industry in such a way as to nullify rights acquired, and to impose sanctions for actions taken, in reliance upon the original policy of abstention is contrary to the intent of Congress and is a denial of due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

3. The enforcement of the unfair labor practice provisions of the Act against parties who have been denied the benefit of the representation election provisions of the Act is contrary to the intent of Congress, and a denial of due process of law in contravention of the Fifth Amendment, particularly where the finding of an unfair labor practice rests upon a determination that a bargaining unit selected by the parties in default of assistance from the Board was "inappropriate".

4. Such portion of the Board's order as directs Respondent to pay back wages to Chester R. Hewes is invalid and improper.

5. Since it appears that Chester R. Hewes would have been rehired upon application to Respondent after the closed-shop contract of August 16, 1947, was superseded by an open-shop contract effective

August 10, 1948, such portion of the Board's order as directs Respondent to pay back wages to Chester R. Hewes for any period after August 10, 1948, is invalid and improper.

ARGUMENT.

I.

THE CLOSED-SHOP CONTRACT OF AUGUST 16, 1947, COVERED A COLLECTIVE BARGAINING UNIT CONSISTING OF ALL OPERATING ENGINEERS THEN EMPLOYED OR THEREAFTER TO BE EMPLOYED ON THE HANFORD ENGINEERING WORKS PROJECT BY RESPONDENT, WHICH WAS A JOINT VENTURE COMPOSED OF MEMBERS OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. THE AGREEMENT WAS MADE IN GOOD FAITH WITH THE LABOR ORGANIZATION WHICH WAS, IN ACTUAL FACT, THE HISTORICALLY RECOGNIZED AND DULY AUTHORIZED COLLECTIVE BARGAINING REPRESENTATIVE OF A MAJORITY OF THE OPERATING ENGINEERS EMPLOYED BY MEMBERS OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA OPERATING WITHIN THE AREA IN WHICH THE PROJECT WAS LOCATED. SINCE THE BOARD, AT AND BEFORE THE TIME THE AGREEMENT WAS MADE, WAS WITHHOLDING FROM THE PARTIES THE STATUTORY FACILITIES FOR THE DETERMINATION BY IT OF AN APPROPRIATE UNIT, THE AGREEMENT CANNOT BE INVALIDATED BY AN EX POST FACTO DETERMINATION BY THE BOARD THAT THE UNIT SELECTED BY THE PARTIES WAS "INAPPROPRIATE".

A. The contract involved.

The contract of August 16, 1947, recites the fact that it is being made and entered into between a joint venture composed of affiliated members of The Associated General Contractors of America, Inc., as the Employer, and various signatory unions affiliated

with the Building and Construction Trades Department of the American Federation of Labor having jurisdiction of the territory in which the Hanford Engineering Works Project is located, thereinafter to be called the "Union" (R. 147). It provides that it shall "cover all employees who are members of the signatory unions who are performing work within the recognized jurisdiction of such unions as the same is defined by the Building Trades Department of the American Federation of Labor, for which employees the Union is recognized as the sole and exclusive bargaining agent" (R. 148-149). It then provides that "the Employer shall hire all employees coming under this Agreement, through the office of the Union or through such other facility as may be designated by the Union," and that "the Employer shall retain in employment only members in good standing of Union or Those Who have signified their intention of becoming members through the regularly established procedure of the Union" (R. 149). Thereafter it provides for the work schedule, overtime, show up time and holidays (Art. VI), for the procedure to be followed in the settlement of disputes, including jurisdictional disputes (Art. VII), for special provisions pertaining to other employers and employees (Art. VIII), for certain rules governing health, sanitation and safety (Art. IX), for miscellaneous basic conditions (Art. X), for wage scales and working rules (Art. XI) and for its effective date and duration. (Art. XIII) (R. 150-159). The contract was signed by 15 building trades unions, including the Interna-

tional Union of Operating Engineers, which was represented in the area by Local Union No. 370 (R. 159-160).

B. The issue as to whether the contract comes within the proviso to Section 8(3).

The initial question which the Board had to determine, and which is now presented to this Court, is whether the contract of August 16, 1947, came within the proviso to Section 8 (3) of the original Act as "an agreement with a labor organization * * * [which] is the representative of the employees as provided in Section 9 (a), in the appropriate bargaining unit covered by such agreement when made." By virtue of the provisions of Section 102 of the amended Act (quoted *supra,* p. 5), such question must be determined in the light of the rules and policies prevailing prior to the effective date of the amended Act.

Initially, it should be pointed out that the fact that a single agreement, such as the contract of August 16, 1947, covers more than one bargaining unit has not been considered as taking the agreement out of the protection of the proviso to section 8 (3). In *American-West African Lines, Inc.* (1940) 21 N.L.R.B. 691, the Board said (pp. 701-702):

> "We are of the opinion that a contract, such as the one here involved, covering employees precisely within separate yet respectively appropriate bargaining units is, if made with the lawful and exclusive representative of the employees in each unit, in accordance with the terms of the proviso clause. **It is immaterial that the parties to such a contract have incorporated into one instrument what could have been done in two.**"

The Board held that the contract of August 16, 1947, did not come within the terms of the proviso to Section 8 (3) because it was not made with the representative of the employees in an appropriate unit. It said (R. 52):

> "It thus clear, without considering further increments thereafter and *without attempting to determine the scope of an appropriate unit,* that in virtually all categories, including that of the operating engineers, *the work force at the time the contract was signed was not at all representative of that shortly to be employed.* Under these circumstances, the union could not have been, as required by the proviso to Section 8 (3), the representative of the employees in an appropriate unit."

In support of its Decision and Order the Board argues in its brief that its determination that the bargaining unit covered by the contract of August 16, 1947, insofar as concerns operating engineers, was "inappropriate," was essential to "afford to employees the fullest freedom in their choice of bargaining representatives and to insure that the choice of representatives reflects 'the will of the majority of the electorate' " (Board's Brief, p. 11). This argument, while it would undoubtedly be pertinent to the establishment of a bargaining unit to govern labor-management relations for the future, has no relevance whatever to the issue involved in this proceeding. Concededly, the validity of the contract of August 16, 1947, is to be determined under the rules in effect prior to the effective date of the amended Act (R.

50-51; Board's Brief, p. 2, n. 3). Concededly, also, at that time the Board was refusing to entertain petitions for the determination of appropriate bargaining units in the building and construction industry, or to hold any representation elections in that industry (R. 54; Board's Brief, pp. 17-18). Therefore, the issue is, not what unit would be appropriate for future collective bargaining in the building and construction industry, but whether a collective bargaining agreement covering a unit selected by the parties in the absence of assistance of the Board and at a time when the Board's facilities were being withheld from them, which unit is reasonably consistent with the basic standards and policies of the Act, can be invalidated by the Board on the ground that it considers the unit "inappropriate".

On the issue as thus defined, Respondent submits that the respective craft units covered by the contract of August 16, 1947, far from being "inappropriate," were in fact the units most in keeping with the policy of the Act, namely, "the policy of efficient collective bargaining" (*Pittsburgh Plate Glass Co. v. National Labor Relations Board* (1941) 313 U. S. 146, 165). They were also the units which, in the building and construction industry, most nearly conformed with the following factors which the Board itself has said should govern the determination of an appropriate bargaining unit (see *Pittsburgh Plate Glass Co. v. National Labor Relations Board, supra,* p. 153):

> "(1) the history, extent, and type of organization of the employees; (2) the history of their

collective bargaining, including any contracts; (3) the history, extent, and type of organization, and the collective bargaining, of employees of other employers in the same industry; (4) the relationship between any proposed unit or units and the employer's organization, management, and operation of his business, including the geographical location of the various plants or parts of the system; and (5) the skill, wages, working conditions, and work of the employees."

C. The unique labor relations problems of the building and construction industry.

The General Counsel and the Board have recognized that the building and construction industry presents special and peculiar problems in collective bargaining and other labor-management relations.

In his initial public pronouncement concerning the impact of the amended Act upon the building and construction industry, the then General Counsel, Robert N. Denham, in an address on February 11, 1948, before the 29th Annual Convention of The Associated General Contractors of America at Dallas, Texas, said (21 LRRM 44, 45-46):

> "The old Wagner Act was general and simple in its terms. It allowed the Board a broad degree of discretion as to the character of cases it would hear or would not hear. It had only one kind of complaint cases—unfair labor practices by employers. That is one of the reasons why **the Board could, and so readily did, take the position, not that it did not have jurisdiction, but that it would not serve to effectuate the**

purposes of the Wagner Act by going into the building and construction industry. To be sure, this avoidance was, in the main, largely predicated on the theory that these businesses are substantially local in nature and that labor relations within the industry were fairly stable. As long as that theory existed, the employers were content to be left alone and the unions were satisfied and, because of the absence of other rights to be interfered with, no one took occasion to object to the Board refusing to extend its operations into that field.

* * *

"But as we approach the construction industry and the trade unions and contractors that are engaged in it, we find ourselves dealing with something which fits into none of the orthodox categories of industry or employment with which the Board is accustomed to dealing. The whole industry is unique in many ways and the mere pattern of employment differs wholly from that to which we have been accustomed. Neither the employee nor the employer stand on stable ground so far as either identity of the employer or the location of the work is concerned. But, regardless of all that, we have a law to administer. It is a law with provisions that vitally affect this industry, and does not leave the employers and the employees wholly free to carry on their relationships in the traditional manner, with eyes completely closed to the existence and provisions of the Taft-Hartley Act."

Thereafter, Mr. Denham, while he was still the General Counsel, appeared at the oral argument of this

case before the Board on December 19, 1949, and issued a proposed statement of enforcement policy in which he stated, in part as follows:

> "Special considerations peculiar to certain portions of the building and construction industry, **including unique employment relationships, bargaining patterns and traditions and unit and eligibility questions** have prevented the National Labor Relations Board and the General Counsel of the Board from establishing satisfactory administrative machinery for conducting union security elections as provided by Sections 8(a)(3) and 9(e) of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136).
>
> "These provisions presuppose some degree of stable employment among the employees whose vote will decide whether their employer and their collective bargaining representative may agree to require membership in the Union as a condition to their continued employment. The building and construction industry, however, is singularly lacking in that degree of stability of employment which is required if elections are to be held under the conventional procedures established pursuant to Section 9(c) and 9(e) of the Act. **Employment in the building and construction industry differs radically in its nature and duration from that in other industries.** As a general rule the building and construction craftsmen work only sporadically for any one employer. Their term of employment is short because their work is limited to the performance of a specialized operation on the construction projects of any number of different contractors. Each job may require only a few days of work. When the job

> is completed, the craftsmen must seek new employment with other contractors. They enjoy regular employment only by reason of the availability of a series of short term jobs on a variety of construction projects under contract with different contractors."

On June 6, 1950, the Board issued a response to this statement in which it acknowledged the existence of "certain widely-recognized difficulties which flow from the character of employment relations in the building construction industry". The General Counsel's statement and the response of the Board thereto are printed in full in the Appendix to this brief.

Most recently, in testifying at a hearing on September 4, 1951, before the Special Subcommittee on Labor-Management Relations of the Senate Committee on Labor and Public Welfare, with reference to S. 1973, now pending before Congress (see *infra,* p. 31), George J. Bott, the present General Counsel, said concerning problems encountered in the building and construction industry (Transcript, Vol. 4, pp. 332-337):

> "The complement of employees changes from job to job. The complement consists of a pool of craftsmen or workmen from which all the contractors in the trade draw for their labor. The workmen, both skilled and unskilled, are constantly moving from job to job. No single employer can be identified as their employer in the conventional sense. They may work for a dozen different contractors in a single year.
>
> "An appropriate unit of employees ordinarily implies a definite employer employing identifiable

employees. If the unit were to be defined on the particular construction project the contractor's work on the project might be completed by the time an election could be held. Conducting elections throughout the industry on this basis might disenfranchise craftsmen not actually employed on the voting eligibility dates fixed by the Board or at the time of the actual election.

"Many craftsmen might be voting in more than one election in view of their employment by so many different employers throughout a short space of time. Perhaps the unit could be an association-wide unit, be held on an association-wide basis, or an area, geographical area-wide basis.

"Perhaps employees not working for any employer in the association or in the area at the time of a proposed election should be permitted to vote if they work for any employer in the association or in the area for some time prior to the election. If so it would be necessary to prescribe the minimum period of employment.

"**This is only an indication of the new vista confronting the Board in tackling election cases in the building and construction field.** Early in the administration of the amended Act the General Counsel decided that viewed realistically the construction workers in any given craft employed with some degree of regularity in discernible economic areas constituted labor pools from which the organized contractors in that area drew for their labor requirements.

"In other words, the concept was that all of the construction workers in any given craft employed

by any of the organized contractors in the area during a respresentative period were the employees of all of the organized contractors and that such employees constituted the appropriate unit.

* * *

"Mr. Barbash. Mr. Bott, were you convinced of the practicability of the labor pool theory?

"Mr. Bott. I think it is a good theory. I think it might work, and it depends upon the good will and the cooperation you get from the parties involved. It also has some defects which I think I can describe a little later in describing the Michigan election. **It may, however, cut across and be in derogation of the standards developed by the National Labor Relations Board over the many years in holding the ordinary elections which raises a problem of itself.**

"It is a very serious matter to go into a big election on a novel theory not knowing when you get through with it whether the Board will accept it as its own theory and whether or not the courts will accept its legality, but I think it was an attractive theory, and **I am not sure that we have anything to substitute for it,** but I hope to —I think that may be evident when I finish."

D. The practical circumstances under which the contract of August 16, 1947, was negotiated.

The Hanford Engineering Works Project is located near Richland, Washington, which is approximately 160 miles from Spokane and approximately 215 miles from Seattle. At the start of the project, there was no large labor supply of any sort readily at hand,

and the local supply of the qualified construction workers needed for Respondent's work was wholly inadequate.

Customarily, the problem of securing an adequate labor supply for specific construction projects, subject to wages and other working conditions which will be known to all interested parties in advance, is handled by the negotiation of area agreements between associations of contractors and the various building and construction trades unions having jurisdiction in the geographical area where the various projects are to be performed. The custom and practice in this regard was concisely stated by the Wage Stabilization Board when it issued General Wage Regulation 12 on May 31, 1951, establishing the Construction Industry Stabilization Commission, as follows (16 F.R. 6640):

> "The work of the [building and construction] industry is performed on separate project sites, rather than in fixed industrial plants. Both contractors and workers are mobile. Contractors move into an area, complete their project as required or allowed by such variables as weather conditions and contractual provisions, and move on to a new job site. Workers may be employed by a number of different contractors, on different projects, in the course of a single season. The employment relationship is thus temporary and intermittent.
>
> "The construction industry is highly organized both as to contractors and workers. Most of the approximately 2,500,000 employees belong to one

of the 19 international unions affiliated with the Building and Construction Trades Department of the AFL, and most contractors, general, specialty or home builders, bargain through associations. Collective bargaining typically takes place between the unions and associations in a locality, and normally proceeds with each craft union negotiating separately. There may also be participation by the national unions and contractors associations. There are accordingly many thousands of separate agreements entered into each year. The wage rates determined through these negotiations are adopted in many cases by contractors who are not association members.

* * *

"The regulation authorizes the Commission to stabilize wages on the basis of areas traditionally established for collective bargaining purposes. **This is called for by the nature and practice of the industry and is in accord with stabilization experience.**"

While these area agreements are concluded prior to the start of most of the projects to which they are intended to apply (R. 204), the unions with whom they are signed are in actual fact the long-established and traditional bargaining representatives of the only men who are qualified and available to work on such projects. The agreements establish the wages, hours and other working conditions which will apply to projects performed while they are in effect, thereby enabling the contractors who are parties to them to make firm commitments involving such labor costs. They also establish orderly procedures for the settlement of dis-

putes arising during the course of a specific project without costly interruptions in the work.

At the time Respondent started to prepare for the performance of work at the Hanford Engineering Works Project there was an available area agreement in effect for the geographical area in which the project was located covering operating engineers and teamsters, which had been negotiated under date of February 28, 1947, by the Spokane Chapter of The Associated General Contractors of America, Inc. (R. 119-122). This agreement contained closed-shop provisions similar to those incorporated into the contract of August 16, 1947. Both of the contractors who composed the Respondent joint venture were affiliated members of The Associated General Contractors of America, Inc., so that the area agreement was available to Respondent for use, had it been adequate for Respondent's purposes (R. 180). Since the area agreement did not cover all of the crafts which would be involved in the Hanford Engineering Works Project, however, Respondent determined to negotiate a special project agreement with all of the needed crafts, which is also a customary procedure in the construction industry in similar situations (R. 181).

This project agreement was the closed-shop contract of August 16, 1947. The contract was negotiated with representatives of 15 of the building trades unions, ranging from laborers and operating engineers, which would be the first crafts needed on the job (R. 187), to cement finishers and roofers, which would be the

last crafts needed. It was negotiated and signed at the outset of the work for sound business reasons having to do with the efficiency of all operations, including efficiency of collective bargaining.

In the first place, Respondent had to rely upon the Unions to man the job (R. 181). Efficient construction operations require the services of trained, skilled craftsmen who specialize in construction work and therefore make themselves available for such work. Over a long period of years the building trades unions in the State of Washington and elsewhere in the Western States had become practically the only source of this type of labor (R. 190-191). Therefore, in order to secure assurance that an adequate supply of craftsmen would be available as and when Respondent needed them, Respondent necessarily had to sign an agreement in advance with the Unions which, as a matter of actual, practical fact, represented those craftsmen (R. 190).

Next, it was important to all parties concerned, including Respondent, Respondent's principals, the General Electric Company and the Atomic Energy Commission, and the craftsmen who were to work on the project, to establish in advance the wages and other working conditions which were to prevail. From Respondent's standpoint, and that of its principals, an exact knowledge of labor costs was essential to proper plans for the development of the project, including probable change orders and additions. The location of the project at a site remote from large centers of pop-

ulation, and the restricted and confidential nature of the work, presented special problems for both management and labor which could only be satisfactorily solved by an agreement prior to the start of major operations. Also, the establishment in advance of the wages and working conditions which would apply on the project for all crafts eliminated the delays which would have inevitably occurred if these matters had been left to piecemeal negotiation after each craft had reached its maximum strength on the project. From the standpoint of the workmen, many of whom were necessarily drawn from a great distance to work on the project, the establishment in advance of wages and working conditions through negotiation with their historical and long-established representatives meant that they were assured of acceptable terms of employment before they committed themselves to the work. Any other procedure would not have been understood, would have created great confusion and would have driven away the competent workmen who were so vitally needed on the project.

It was also essential to establish in advance an orderly procedure for the hearing and settlement of any disputes which might occur in the course of the work, either between the Respondent and its workmen or between the various crafts employed on the project. Construction work is always carefully geared to time-schedules for the various operations involved, and any prolonged strike or work-stoppage affecting any one of the operations inevitably disrupts the entire proj-

ect, with serious loss both to the contractors and the workmen. Experience in the construction industry has shown that if a method of settling disputes is established by agreement between management and labor in advance, before any such dispute has arisen, the likelihood of interruptions in the work due to strikes or work stoppages is materially diminished.

E. The problem of the appropriate bargaining unit.

Having in view the custom and practice in the construction industry, and the practical considerations above outlined, there were two possible types of bargaining units which could reasonably be said to have been covered by the contract of August 16, 1947, when made: namely, (1) as to each craft, all members of such craft then employed or thereafter to be employed by Respondent on the Hanford Engineering Works Project, and (2) at least as to operating engineers and teamsters covered by the area agreement of February 28, 1947, all members of those crafts employed or to be employed by members of The Associated General Contractors of America, Inc., operating within the Eastern Washington and Northern Idaho territory. With regard to this second unit, it is apparent that a project contract, such as the contract of August 16, 1947, concluded with the recognized collective bargaining representative of all operating engineers employed or to be employed *within the area* in which the project is located, is an agreement with the representative as provided in Section 9 (a) of the Act of all operating engineers employed or to be employed *on the project.*

Either of these two units would have effectuated "the policy of efficient collective bargaining". Either of the units would also have been in keeping with the other factors mentioned by the Supreme Court in the *Pittsburgh Plate Glass Co.* case, quoted *supra* at page 14. Concededly, either unit would have presented a difficult problem insofar as the holding of an election was concerned, but since the Board was not providing facilities for the holding of *any* elections in the building and construction industry at or prior to the time when the contract was made, this factor should have no relevance.

In its decision and order in this proceeding the Board made no effort to determine whether the bargaining units formulated by management and labor in default of its assistance could be reconciled with the factors which it and the Supreme Court have deemed to be controlling in unit determinations. The only reason it gave for holding that the contract of August 16, 1947, did not cover an appropriate unit was that "the work force at the time the contract was signed was not at all representative of that shortly to be employed" (R. 52). This statement presupposes that on every construction project a point is reached where there is a sufficiently "representative" work force on the job to permit of a representation election. It also implies that postponement of the processes of collective bargaining until such point has been reached and an election has been held would effectuate "the policy of efficient collective bargaining" and would accord with the other factors above mentioned bearing upon unit determinations.

Neither of these suppositions has any basis in fact. On no construction project is there ever a time when the work force can be truly said to be "representative". Construction employees are divided into numerous crafts which from the outset of union organization in this country have been represented by craft unions, chiefly if not exclusively by the 19 building and construction trades unions (see statement of Wage Stabilization Board quoted *supra,* pp. 21-22). There is never a point on a construction project when a "representative" work force of every craft is in the employ of the contractor at the same time.

On a typical building construction project the laborers and operating engineers will come first, to do the excavation and site-clearing work. They will be followed by pile drivers, iron workers and carpenters, who will put in the foundation and the framework of the structure. Then the specialty crafts, such as the electricians, the plumbers, the plasterers and the painters, will do their allotted work. To make matters more complex, these specialty craftsmen are not customarily employed by the general contractor, but are employees of subcontractors. Finally, the cement finishers and the roofers will complete the structure.

Naturally, there is never a clear-cut cleavage between crafts at any stage of the project. For instance, there will probably be some laborers and carpenters on the project from start to finish. But the numbers of these basic craftsmen will fluctuate widely and rapidly, as the project moves from stage to stage.

Frequently specialty craftsmen, such as electricians, will come on the project in large numbers to perform one step for which they are required, will then leave completely and return later in force to perform another step of the project.

In view of these fundamental and inescapable facts, the application to the building and construction industry of the Board's "representative work force" principle—a principle which was developed in other, completely unrelated industries[3]—is impossible if the considerations governing unit determinations which the Board itself has developed are to control and if the standard laid down by Congress, namely, "the policy of efficient collective bargaining", is to be followed.

If the Board disregarded craft lines and held an election on a construction project among all of the men who were on the project when its maximum work force had been reached, for the purpose of selecting a single bargaining representative for the men, it would fly in the face of every factor which the Board has held should govern a unit determination.[4] Such action would ignore completely

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[3]The cases cited by the Board in support of this principle arose in a lumber mill (*Coast Pacific Lumber Co.*, 78 N.L.R.B. 1245, 1246), a manufacturing plant (*Westinghouse Electric Corporation*, 85 N.L.R.B. 1519) and a power house (*Anaconda Wire & Cable Co.*, 91 N.L.R.B. No. 37), where the problem of ever-changing craft composition was not involved.

[4]Compare *Ozark Dam Constructors* (1948), 77 N.L.R.B. 1136, where the petitioning organization was a local building trades council. Bargaining through building trades councils is not the prevailing practice in the building and construction industry. See statement of Wage Stabilization Board, quoted *supra*, pp. 21-22.

"(1) the history, extent, and type of organization of the employees; (2) the history of their collective bargaining, including any contract; (3) the history, extent, and type of organization, and the collective bargaining, of employees of other employers in the same industry; (4) the relationship between any proposed unit or units and the employer's organization, management, and operation of his business * * * ; and (5) the skill, wages, working conditions, and work of the employees."

On the other hand, if the Board were to attempt to hold an election within each craft as it approached its maximum numerical strength on the project, for the purpose of selecting a bargaining representative for that craft for the project, it would involve collective bargaining on the project in such tanglefoot that neither the contractor, nor the men, nor the Board would know where they stood. Obviously, such a travesty could not effectuate the basic policy of efficient collective bargaining.

The strongest proof of the almost fantastic inadequacy of the Board's treatment of the "appropriate" unit problem is found in what has happened since the public pronouncement of its decision in this proceeding on June 8, 1950.

On August 9, 1951, Senator Robert A. Taft of Ohio introduced (for himself, Mr. Humphrey, Mr. Cain, and Mr. Nixon) S. 1973 in the Senate of the United States. The proposed bill would amend the Act to provide expressly that an employer engaged in the building and construction industry may make an

agreement covering building and construction trades workmen without the requirement of a *previous* representation election.

The Sub-Committee on Labor-Management Relations of the Senate Committee on Labor and Public Welfare held hearings on this bill on August 27, 28 and 29 and September 4, 1951. One of the main points expressed by witnesses at these hearings was that the irritant that caused the drafting and introduction of the bill was the impractical and unworkable "appropriate" unit test announced by the Board in this proceeding. Almost without exception every witness experienced in the building and construction industry testified that the Board's test cannot be made to work under actual job-site conditions. It is as unrealistic and unworkable as it is erroneous.

The Board's decisions subsequent to its decision and order in this case indicate that upon more careful consideration of the matter, the Board itself has determined that the "representative work force" principle is not workable in the building and construction industry, considered as a whole. When the Board recently decided that it should proceed to hold representation and union security elections in the building and construction industry generally, the bargaining unit which it held to be appropriate for such purposes was a single-craft area-wide unit, namely, all plumbers, plumbers apprentices, and gasfitters employed by members of a designated contractors association in a designated geographical area. *The Plumbing Con-*

tractors Association of Baltimore, Maryland, Inc., April 2, 1951, 93 NLRB No. 177, 27 LRRM 1514; *Plumbing and Heating Contractors Association of Olean, New York,* April 2, 1951, 93 NLRB No. 176, 27 LRRM 1520. **Thus, the Board has now designated as appropriate for the building and construction industry a unit which is of the same type as the unit which could reasonably be said to be covered by the closed-shop contract of August 16, 1947.**

F. The contract of August 16, 1947, should be held to be within the proviso to Section 8 (3) of the Act.

If the Board had been entertaining petitions for representation elections in the building and construction industry at and prior to the time that the contract of August 16, 1947, was executed, and *if* through the exercise of such jurisdiction it had established the principle which it has now announced in the *Baltimore* and *Olean* cases, the parties to that contract, and particularly Respondent, could have protected themselves against the type of unfair labor practice charge involved in this proceeding, and still have secured the important benefits of written contracts executed prior to the start of operations, through the medium of area agreements negotiated by the Spokane Chapter of The Associated General Contractors of America, Inc., with the various craft unions. The refusal of the Board to hold elections and make unit determinations in the building and construction industry deprived Respondent and the unions with which it was required to deal of the assistance and guidance from

the Board to which they were entitled, both in fairness and in law (compare *Ford Motor Co.,* August 2, 1951, 95 NLRB No. 121; 28 LRRM 1371). In view of this circumstance, the Board's determination that the bargaining unit selected by the parties to the contract of August 16, 1947, was not as "appropriate" as one which it might have selected, had it been exercising the jurisdiction given it by the law, should not invalidate a contract which covered a unit reasonably analogous to one which the Board has now approved.

The Board, in its brief (pp. 15-16), assumes that the argument herein made, based upon the custom and practice in the building and construction industry, is directed at securing a determination that the proviso to Section 8 (3) is inapplicable to that industry. As we have shown, however, Respondent contends, not that the terms of the proviso should be ignored, but that in the circumstances of this case, under which the parties were left to formulate a bargaining unit unaided by the Board, such terms should be liberally construed to encompass the unit covered by the contract of August 16, 1947, which unit had developed out of custom and practice **and the demands of efficient collective bargaining** in the building and construction industry. As we have also shown, such use of custom and practical considerations in arriving at the determination of an appropriate bargaining unit is in keeping with the past practice of the Board in other industries.

The Supreme Court has said that the primary objective of Congress in enacting the National Labor Relations Act was "to achieve stability of labor relations" *(Colgate-Palmolive-Peet Co. v. National Labor Relations Board* (1949), 338 U. S. 355, 362). We respectfully submit that in furtherance of such objective, this Court should hold that where, as in this case, the Board has refused to provide the parties with the statutory facilities for the determination of an appropriate bargaining unit, a contract with a labor organization which is the representative of employees in a unit that is reasonably consistent with the basic standards and policies of the Act, is within the terms of the proviso to Section 8 (3) of the Act. We submit, further, that under such a holding the contract of August 16, 1947, would be and is within the protection of that proviso.

II.

THE RETROACTIVE APPLICATION OF THE CHANGE IN THE BOARD'S ADMINISTRATIVE POLICY OF ABSTAINING FROM THE EXERCISE OF JURISDICTION OVER THE BUILDING AND CONSTRUCTION INDUSTRY IN SUCH A WAY AS TO NULLIFY RIGHTS ACQUIRED, AND TO IMPOSE SANCTIONS FOR ACTIONS TAKEN, IN RELIANCE UPON THE ORIGINAL POLICY OF ABSTENTION IS CONTRARY TO THE INTENT OF CONGRESS AND IS A DENIAL OF DUE PROCESS OF LAW IN CONTRAVENTION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

If, despite the reasons given under point I of our argument, this Court holds that the contract of August 16, 1947, does not come within the terms of the

proviso to Section 8 (3), the Court must then determine whether the performance of an obligation under a contract which was executed at a time when the Board was refusing to exercise jurisdiction over the parties can legally and constitutionally be treated as an unfair labor practice by the Board. As we have already noted (*supra,* p. 6), the importance of this question transcends the relatively narrow limits of this case. The Board is continually revising its jurisdictional standards, and issuing decisions and pronouncements which purport to exclude entire industries from the benefits and burdens of the Act. If, notwithstanding these decisions and pronouncements, the Board may thereafter invalidate contracts executed, and treat as unfair labor practices acts performed, in reliance upon such decisions and pronouncements, the result will be to create intolerable conditions of instability and uncertainty in labor relations in the industries affected.

The Board itself, in cases decided since the entry of the decision and order in this proceeding, has recognized that the exercise of such authority, assuming its existence, would be contrary to the objectives and policies of the Act.

In *Compressed Air, Foundation, Caisson, Tunnel, Subway, Sewer, Cofferdam Construction Local Union No. 147 of New York, New Jersey States and Vicinities,* April 26, 1951, 93 NLRB No. 274, the Board held that the discharge of an employee on March 12, 1948, pursuant to a closed-shop contract between a contractor and a construction union was not an un-

fair labor practice, even though, as in this case, the contract was executed before a representative work force had been hired, where the validity of the contract had previously been upheld by the New York State Labor Relations Board acting pursuant to an agreement between that Board and the National Board authorizing the State Board to exercise jurisdiction over construction operations. The National Board said:

> "At all times relevant hereto, the Employer's operations were a part of the building and construction industry. In 1946, at the time of the State Board proceeding, there was in existence an agreement between the National Labor Relations Board and the State Board, reached in 1937, authorizing the State Board to exercise jurisdiction over construction operations in New York State such as those in which the Employer was engaged. Thus, **not only was the State Board the only agency to which the parties could then look for a determination of the validity of their contract and their rights thereunder;** it was also an agency which, in asserting jurisdiction over the employer for the purpose of making such a determination, was acting within the scope of an agreement with the National Board.
>
> "On these facts, we conclude, contrary to the Trial Examiner, that the validity under the Wagner Act of the 1945 closed-shop contract here in issue should not at this time be opened to question by this Board. Unlike the Trial Examiner, we find it unnecessary to decide whether the State Board's action constituted such a final determination of the validity of the contract as

would be binding upon this Board as a matter of law. That action was, at the very least, advice to the parties that their closed-shop contract was valid, which advice was given by a sister governmental agency acting in an area which had been entrusted to it by this Board. **We believe that the policies of the Act and the public interest in stability in labor relations will best be served by holding that, because of the 1937 agreement, the parties were entitled to continue to regard the State Board's action as determinative of the validity under the Wagner Act of their closed-shop contract. Both equity and comity dictate this result.** Because we do not agree with our dissenting colleague that Section 10(a) of the amended Act compels the opposite conclusion, we hold that this Board should not make its processes available to upset a determination made by a sister Board at a time when the latter had full authority to act. Proper respect for that action leads us to conclude that the contract remained a valid basis for the discharge when it occurred, unless subsequent to the effective date of the amended Act it has been renewed or extended, and therefore should be denied the protection of Section 102."

The sole factual distinction between the *Compressed Air* case and this case is that in New York there was a State Labor Relations Board to which the parties could appeal for a determination of the validity of their contract and such Board had ruled in favor of the contract. There was no similar Board in the State of Washington, so that the parties to

the contract of August 16, 1947, had *no* agency to look to for a determination of the validity of the contract. Since the National Board had left them to their own devices, however, they had as much right to assume that their contract was valid as did the parties to the *Compressed Air* contract, and a retroactive determination that the contract was invalid is equally as inequitable and as violative of the policies of the Act as it would have been in the *Compressed Air* case.

In another case, *C. A. Braukman and Lucille Braukman d/b/a Screw Machine Products Company,* June 29, 1951, 94 NLRB No. 234, 28 LRRM 1230, the Board dismissed unfair labor practice charges against an employer arising out of acts occurring at a time when it was refusing to assert jurisdiction over the employer in a representation proceeding, saying:

> "When the complaint issued, the Board was reexamining its policy concerning the exercise of jurisdiction; thereafter, during October 1950, we announced certain specific criteria for the assertion of jurisdiction. It appears, as found by the Trial Examiner, that the Respondent's volume of interstate commerce at about the time the alleged unfair labor practices were committed satisfied the Board's current jurisdictional criteria. **The question thus posed is whether or not the Board should apply retroactively its present jurisdictional standards, and assert jurisdiction in the instant complaint case, although the Board had before and after the commission of the alleged**

unfair labor practices, refused to assert jurisdiction over the Respondent's operations on the basis of then existing standards.

"The Board believes that the question should be answered in the negative. This result is dictated not only by the Board's obligation to respect its own prior decisions, but also by a desire for fair play. It would be inequitable now to hold the Respondent liable for the activities in question, as the Board, almost 2 years ago, in effect advised the Respondent that such activities occurred at a time when 'it would /not/ effectuate policies of the Act to assert jurisdiction' over the Respondent's operations. This ruling imposes no hardship upon the Respondent's employees which they might not reasonably have anticipated, as they engaged in the concerted activities in question after the Board had refused to assert jurisdiction over the Respondent's operations."

The decisions in the two cases above-cited cannot be reconciled with the decision and order in this proceeding. Neither in its Decision and Order nor in its brief has the Board advanced any reason why the retroactive application in this case of the admitted change in its administrative policy of abstention is either equitable or in furtherance of the policies of the Act. Its sole argument in support of the decision and order is that " 'The principles of equitable estoppel [cannot] be applied to deprive the public of the protection of a statute because of mistaken action or lack of action on the part of public officials' " (Brief, p. 18).

Respondent does not claim that the Board's refusal to assert jurisdiction over the building and construction industry constituted "mistaken * * * lack of action". Such refusal was deliberate, intended, and within the authority and discretion of the Board under the Act *(Haleston Drug Stores v. National Labor Relations Board* (9th C.A., 1951), 187 F. (2d) 418). Congress intended, however, that the Board should exercise its authority to assert or to refuse to assert jurisdiction in particular cases in such a way as to effectuate the policies of the Act (see *Haleston Drug Stores v. National Labor Relations Board, supra,* at p. 421). The primary objective of the Act is to achieve stability in labor relations *(Colgate-Palmolive-Peet Co. v. National Labor Relations Board* (1949), 338 U. S. 355, 362, *supra).* Therefore, since as we have shown and the Board has conceded in the cases cited, the retroactive application of the Board's discretionary authority disrupts rather than stabilizes labor relations, it is clear that the Board had no authority or discretion under the Act to apply retroactively the change in its policy of abstention from the exercise of jurisdiction over the building and construction industry.

If it were to be assumed, however, that Congress intended that the Board should have authority to apply this change in administrative policy retroactively, the exercise of such authority would constitute a denial of due process of law in contravention of the Fifth Amendment. Such change in administrative policy, affecting, as it did, an entire industry, was

legislative in character, and under well-settled principles of due process, could not be given retroactive effect so as to invalidate rights previously acquired and impose sanctions for acts to which no sanctions were attached when they were performed.

In *Arizona Grocery v. Atchison Ry.* (1932), 284 U. S. 370, the issue was whether the Interstate Commerce Commission had power to award reparations with respect to shipments which had moved under rates approved or prescribed by it. In holding that the Commission had no such power, the Supreme Court said (p. 389):

> "The Commission in its report confuses legal concepts in stating that the doctrine of res judicata does not affect its action in a case like this one. It is unnecessary to determine whether an adjudication with respect to reasonableness of rates theretofore charged is binding in another proceeding, for that question is not here presented. The rule of estoppel by judgment obviously applies only to bodies exercising judicial functions; it is manifestly inapplicable to legislative action. The Commission's error arose from a failure to recognize that when it prescribed a maximum reasonable rate for the future, it was performing a legislative function, and that when it was sitting to award reparation, it was sitting for a purpose judicial in its nature. In the second capacity, while not bound by the rule of res judicata, it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute

> a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself."

The principle announced in the *Arizona Grocery* case is analogous to the principle, also well-established, that neither criminal nor civil penalties may constitutionally be imposed under a statute which does not define an offense with sufficient certainty to apprise the persons subject to it of the acts which they are forbidden to perform (*International Harvester Co. v. Kentucky* (1914), 234 U. S. 216, 223; *Small Co. v. Am. Sugar Ref. Co.* (1925), 267 U. S. 233 239; *Cline v. Frink Dairy Co.* (1927), 274 U. S. 445, 465; *Champlin Ref. Co. v. Commission* (1931), 286 U. S. 210, 243). Due process requires that individuals be informed beforehand that particular action is forbidden and will subject them to penalties or other sanctions before such penalties and sanctions may be imposed.

In *Lanzetta v. New Jersey* (1939), 306 U. S. 451, in holding that a criminal statute was void by reason of vagueness and uncertainty, the Supreme Court said (p. 453):

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. *United States v. Reese,* 92 U. S. 214, 221; *Czarra v. Board of Medical Supervisors,* 25 App. D. C. 443, 453. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See *Stromberg v. Cali-*

fornia, 283 U. S. 359, 368; *Lovell v. Griffin,* 303 U. S. 444. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. **All are entitled to be informed as to what the State commands or forbids.** The applicable rule is stated in *Connally v. General Construction Co.,* 269 U. S. 385, 391: "**That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law.** And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The principle of these authorities is applicable here. Admittedly the Board, by decisions in unfair labor practice cases and by refusal to entertain representation petitions, had advised management and labor in the building and construction industry that it would not assert jurisdiction over that entire industry under the original Act. Under these circumstances, Respondent and the unions with which it dealt had no other alternative than to proceed upon the assumption that the facilities of the Board were closed to them and that the unfair labor practice provisions of the Act did not apply to their operations and transactions. They had vitally important work to do, and they had to get on with it under the rules

which were then in effect. If the Board continued its uniform policy of abstaining from the exercise of jurisdiction over the industry, then the unions had the *right* to demand a closed-shop contract without regard to their representative standing and Local 370 of the Operating Engineers had the *right* to demand the discharge of Chester R. Hewes pursuant to its contract. At the time Respondent complied with these demands, it had to assume that the Board would continue its policy of abstention, since any other assumption would be based upon pure speculation and guess.

We respectfully submit, therefore, (1) that the Act does not authorize the Board to treat as an unfair labor practice the performance of an obligation under a collective bargaining agreement executed at a time when the Board was refusing to assert jurisdiction over the parties, and (2) that in any event, the exercise of such authority in such a way as to nullify rights acquired, and to impose sanctions for action taken, in reliance upon the Board's policy of abstention is an unconstitutional denial of due process of law.

III.

THE ENFORCEMENT OF THE UNFAIR LABOR PRACTICE PROVISIONS OF THE ACT AGAINST PARTIES WHO HAVE BEEN DENIED THE BENEFITS OF THE REPRESENTATION ELECTION PROVISIONS OF THE ACT IS CONTRARY TO THE INTENT OF CONGRESS, AND A DENIAL OF DUE PROCESS OF LAW IN CONTRAVENTION OF THE FIFTH AMENDMENT, PARTICULARLY WHEN THE FINDING OF AN UNFAIR LABOR PRACTICE RESTS UPON A DETERMINATION THAT A BARGAINING UNIT SELECTED BY THE PARTIES IN DEFAULT OF ASSISTANCE FROM THE BOARD WAS "INAPPROPRIATE".

Under the National Labor Relations Act, the Board is charged with two principal functions. One is "the certification, after appropriate investigation and hearing, of the name or names of representatives, for collective bargaining, of an appropriate unit of employees" *(A.F. of L. v. Labor Board* (1940), 308 U. S. 401, 405). The other is "the prevention by the Board's order after hearing and by a further appropriate proceeding in court, of the unfair labor practices enumerated in Section 8" *(A.F. of L. v. Labor Board, supra).*

In *Matter of The Plumbing Contractors Association of Baltimore, Maryland, Inc.,* April 2, 1951, 93 NLRB No. 177, 27 LRRM 1514, the Board held, with respect to the building and construction industry, that Congress did not intend that it should perform the second of these functions, namely, the prevention of unfair labor practices, while it was refusing to perform the first of these functions. It said (27 LRRM 1517):

> "As the Board has pointed out in earlier cases involving the building and construction indus-

try, the legislative history of the amended Act clearly establishes the intent of Congress in 1947 that the Board should assert jurisdiction in that industry for the purpose of preventing certain unfair labor practices by labor organizations. Consistent with that intent, the Board has asserted jurisdiction in unfair labor practice cases arising under Section 8 (b) (4) of the Act, when such assertion was appropriate on the basis of the commerce facts established therein. In addition, however, to proscribing certain conduct by labor organizations, Section 8 (b) (4) excepts from such proscription, or grants certain benefits to, a labor organization which has been certified pursuant to Section 9(c). Section 8(b)(2), when read in conjunction with Section 8(a)(3), grants to a labor organization which has been certified pursuant to Section 9(e)(1) the right to enter into and enforce a union-security contract. If, as we think it must, the Board is to continue in appropriate cases to process complaints and issue cease and desist orders against labor organizations in the building industry, it would be most inequitable for the Board, at the same time, to deny to labor organizations the benefits which accrue from certification when, in appropriate cases, our jurisdiction is invoked. We do not believe that Congress intended that in this industry the Board would wield the sword given it by the Act, but that labor organizations desiring it should be denied the shield of the Act. We believe, rather, that in providing that certain benefits would flow from certification, Congress intended that the shield should go with the sword, and that the Board should to this end

> **assert jurisdiction in representation and union-security authorization cases to the same extent and on the same basis as in unfair labor practice cases.** Unless and until Congress, for reasons of policy, provides otherwise by appropriate legislation, we must proceed on that basis. **We could not take any other course without flouting the will of Congress as now expressed in the 1947 statute.''**

Concededly the Board was not performing the function of issuing certifications in the building and construction industry prior to the effective date of the amended Act. Therefore, under the Board's reasoning in the *Baltimore Plumbers* case—which we submit is sound,—it would be contrary to the intent of Congress, and would not effectuate the policies of the Act, to hold that the performance of an obligation under a collective bargaining agreement entered into in the building and construction industry prior to the effective date of the amended Act constituted an unfair labor practice under section 8 (3) of the original Act. Obviously, such a holding, as we have pointed out in other connections, would create instability rather than stability in labor relations, and it should not be enforced by this Court (see *National Labor Relations Board v. Flotill Products Co.* (9th C.A., 1950) 180 F. (2d) 441; *National Labor Relations Board v. C. W. Hume,* (9th C.A., 1950) 180 F. (2d) 445).

Further, if the Act were to be construed as giving the Board discretion to withhold the ''shield'' from the building and construction industry while wielding

the "sword" therein, such a construction would render the Act void as violative of due process of law. There could be no reasonable justification for such a discriminatory treatment of a single industry. The Act was enacted for the purpose of protecting and preserving the important contract rights flowing from collective bargaining (*Edison Co. v. Labor Board* (1938) 305 U. S. 197, 238). Management and labor in the building and construction industry are as much entitled to the protection of such rights as management and labor in other industries, and the application of the Act to them in such a way as to emasculate these rights without providing any means for protecting and preserving them would constitute discrimination "gross enough * * * as equivalent to confiscation and therefore void under the Fifth Amendment" (see *Hamilton Nat. Bank v. District of Columbia* (App. D. C. 1946) 156 F. (2d) 843, 846, (1949) 176 F. (2d) 624, *cert. den.*, 338 U. S. 891).

IV.

SUCH PORTION OF THE BOARD'S ORDER AS DIRECTS RESPONDENT TO PAY BACK WAGES TO CHESTER R. HEWES IS INVALID AND IMPROPER.

The power of the Board to command affirmative action, such as the payment of back wages, is remedial and not punitive (*Edison Co. v. Labor Board* (1938) 305 U. S. 197, 236). At the time it executed the contract of August 16, 1947, and at the time it discharged

Chester R. Hewes, Respondent reasonably assumed that its action was not violative of the Act or of any other law. Both the Board (R. 53) and the Trial Examiner (R. 86) found that it had acted in good faith. In these circumstances, the fact that the Board has now departed from its original policy of absention insofar as the building and construction industry is concerned should not operate retroactively to subject Respondent to monetary sanctions.

In *Chicot County Dist. v. Bank* (1940) 308 U. S. 371, the Supreme Court, in considering the effect to be given a judicial decision holding an Act of Congress unconstitutional, insofar as concerns rights accruing and actions taken during the period between the enactment date of the statute and the date of the judicial decision of unconstitutionality, said (p. 374):

> "The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton v. Shelby County,* 118 U. S. 425; *Chicago, I. & L. Ry. Co. v. Hackett,* 228 U. S. 559, 566. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. **The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored.** The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as

> to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. **Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.** These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

The administrative policy of the Board in abstaining from the exercise of jurisdiction in an entire industry has "consequences which cannot be justly ignored" (compare *Ford Motor Co.* (1951) 95 NLRB No. 121, 28 LRRM 1371). Persons otherwise subject to the Act must continue their business and other affairs in conformity with the policy then in effect. To thereafter impose monetary sanctions for acts taken in reliance upon the existing policy is contrary to fundamental principles of fair play, and could not possibly effectuate any policy of the Act.

In *National Labor Relations Board v. Don Juan Co.* (1949) 178 F (2d) 625, the United States Court of Appeals for the Second Circuit remanded a proceeding to the Board for a statement of the reasons which led the Board to enter a back pay award not-

withstanding that the discharge involved had been made in good faith. Thereafter the court reported as follows (185 F. (2d) 393, 394):

> "The Board has now considered the effect of good faith on an award of back pay, and has made the following declaration of policy in response to the remand of the proceeding:
>
> " 'We believe that the inherent equities of such a situation require that, whether the discharges were made in good faith or bad faith, the financial loss resulting therefrom should be borne by the Respondents, who committed the illegal acts, not by the two employees who were discharged through no fault of their own. The risk of mistake in construing ambiguous provisions of a supposed union-security contract should reside with the party who misinterprets the contract, rather than with the employees against whose interest the contract has erroneously been thought to run.' "

While an employer may reasonably be said to assume the risk of the erroneous interpretation of an ambiguous contract, since it is within the employer's power to resolve the ambiguity by amendment to the contract, in this proceeding the Board's own administrative policy of abstention left Respondent helpless to protect itself. Therefore the "inherent equities" of the case rest with Respondent, and call for a denial of enforcement of the Board's order insofar as it imposes monetary sanctions against Respondent. "The powers conferred upon this court by the National Labor Relations Act to enforce the orders of the Board are equitable in nature and may be invoked only if the

relief sought is consistent with the principles of equity" (*National Labor Relations Board v. National Biscuit Co.* (3rd C. A., 1950) 185 F. (2d) 123, 124).

We respectfully submit that under the circumstances of this case, such portion of the Board's order as directs the payment of back wages to Chester R. Hewes is not consistent with the principles of equity, and should not be enforced by this Court.

V.

SINCE IT APPEARS THAT CHESTER R. HEWES WOULD HAVE BEEN REHIRED UPON APPLICATION TO RESPONDENT AFTER THE CLOSED-SHOP CONTRACT OF AUGUST 16, 1947, WAS SUPERSEDED BY AN OPEN-SHOP CONTRACT EFFECTIVE AUGUST 10, 1948, SUCH PORTION OF THE BOARD'S ORDER AS DIRECTS RESPONDENT TO PAY BACK WAGES TO CHESTER R. HEWES FOR ANY PERIOD AFTER AUGUST 10, 1948, IS INVALID AND IMPROPER.

The provisions of the closed-shop contract of August 16, 1947, expired on August 10, 1948, and the agreement thereafter in effect between the parties provided for open-shop conditions (R. 163-172). After August 10, 1948, there was no bar to the employment by Respondent of Chester R. Hewes, but he never thereafter applied for employment (R. 172-173).

Respondent urged before the Board (R. 30), and now urges before this Court, that under these circumstances any back pay award (assuming such an award in any amount is proper) should be limited to the period between the date of the discharge on Feb-

ruary 18, 1948, and the expiration date of the closed-shop contract on August 10, 1948. The Board answered this contention with the statement that "It is the employer's duty to remedy a discriminatory discharge by offering reinstatement" (R. 54, n. 15; see Board's Brief, pp. 19-20).

The difficulties and equities of Respondent's position, in view of the Board's original administrative policy of abstention, have already been set out in this brief (*supra,* pp. 20-32). None of the cases cited by the Board in support of its ruling on this point (Brief, pp. 19-20), involved a similar factual situation. Certainly the fact that the discharge of Mr. Hewes may have involved no fault on his part (*National Labor Relations Board v. Don Juan Co., supra)* should not excuse his lack of diligence or indifference subsequent to the expiration of the closed-shop contract, at which time any possible equities in his favor disappeared. The very minimum of the relief to which Respondent is entitled in this Court would be a denial of enforcement of any portion of the award calling for the payment of back wages after August 10, 1948.

CONCLUSION.

While each of the first three points urged in this brief furnishes a separate, distinct and individually sufficient ground for denying enforcement of the Board's order herein, the basic consideration behind each of them is that it would be inequitable to apply

the Board's changed policy toward the building and construction industry retroactively. The Board has not advanced, either in its decision and order or in its brief, any sound reason why such retroactive application would effectuate the policies of the Act. On the contrary, it is clear from the provisions of Sections 102 and 103 of the amended Act that Congress intended that the transition from the original Act to the amended Act should be gradual (see H.R. No. 510, June 3, 1947, 80th Cong., 1st Sess., U. S. Code Cong. Serv. 1947, pp. 1135, 1167), and that none of the provisions of the amended Act should apply retroactively. We submit that the same principle of non-retroactivity should apply to the Board's administrative policies under the Act.

We respectfully submit that the order of the Board is not valid or proper, and that it should not be enforced by decree of this Court.

Dated, San Francisco, California,
September 24, 1951.

GARDINER JOHNSON,
THOMAS E. STANTON, JR.,
Attorneys for Respondent.

(Appendix Follows.)

Appendix.

Appendix

STATEMENT OF ENFORCEMENT POLICY PROPOSED BY GENERAL COUNSEL FOR FORMULATION AND ADOPTION FOR THE GUIDANCE OF THE PUBLIC PURSUANT TO SECTION 3(a)(3) OF THE ADMINISTRATIVE PROCEDURE ACT.

Special considerations peculiar to certain portions of the building and construction industry, including unique employment relationships, bargaining patterns and traditions and unit and eligibility questions have prevented the National Labor Relations Board and the General Counsel of the Board from establishing satisfactory administrative machinery for conducting union security elections as provided by Sections 8 (a) (3) and 9 (e) of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136).

These provisions presuppose some degree of stable employment among the employees whose vote will decide whether their employer and their collective bargaining representative may agree to require membership in the Union as a condition to their continued employment. The building and construction industry, however, is singularly lacking in that degree of stability of employment which is required if elections are to be held under the conventional procedures established pursuant to Section 9 (c) and 9 (e) of the Act. Employment in the building and construction industry differs radically in its nature and duration from that in other industries. As a general rule the building and construction craftsmen work only sporadically for any one employer. Their term of employment is

(1) Will deem the union shop authorization requirements of Section 8 (a) (3) and 9 (e) to have been met, despite the fact that no election may have been held, until such time as administrative machinery has been established and made available to the public;

(2) Will compute the 30-day provisions of Section 8 (a) (3) as satisfied by a showing of total employment for 30 days by any employer or employers, either singly or in the aggregate, in the unit covered by the collective bargaining contract containing the union security provision; and

(3) Will process in normal fashion all cases which, despite the considerations set forth in paragraphs (1) and (2) above, involve violations of any of the unfair labor practice sections of the Act.

This policy will apply only to those situations within the industry where, because of the difficulties heretofore described, it is administratively impracticable to conduct an election pursuant to Section 9 (e) of the Act, and where the union has fully complied with the filing requirements of Section 9 (f), (g) and (h) of the Act. It does not apply to those situations where employment is sufficiently stable to permit the conduct of elections. Nor does it apply to that type of conduct with respect to union security which is outside the allowable area defined in the proviso to Section 8 (a) (3) of the Act and which would be within the prohibition of Sections 8 (a) (3) and 8 (b) (2) notwithstanding actual union security authorization.

NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

Immediate release
Tuesday, June 6, 1950 (R-326)

STATEMENT OF N.L.R.B. POLICY ON BUILDING CONSTRUCTION INDUSTRY.

The National Labor Relations Board today issued the following statement of its unanimously-adopted policy in the building construction industry:

Some time ago the General Counsel announced that, because of certain widely-recognized difficulties which flow from the character of employment relations in the building construction industry, he would not seek to enforce the union-shop provisions of the Taft-Hartley Act there as fully as he would elsewhere. The Board appreciates the General Counsel's persistent efforts to find a solution of these problems, which lie far more within his statutory and delegated jurisdiction than within ours.

Yet we cannot join in so much of the General Counsel's proposed policy as would tend to vary or nullify the plain language of the present statute, no matter how tempting practical considerations might make that course. We find no authority to take such a step, especially in the light of the Supreme Court's admonition in the recent *Colgate-Palmolive-Peet* decision.

> "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the

> Board's policy * * *. To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress."

Assuming that we are to continue to exercise jurisdiction over the building construction industry, and yet that some of the union shop provisions of the Act cannot be made to work there, it is our duty to report that fact to the Congress, rather than to change the law ourselves by administrative exemption of a single industry.

Of course, so long as the General Counsel thinks it fairest and best to exercise his exclusive discretion by declining to issue complaints of unfair labor practice if employees are discharged pursuant to an unauthorized union-shop contract, the Board could not, if it would, conduct a hearing or find a violation of law. If and when, however, any such case reaches the Board Members for decision, we will have no choice but to enforce the law as written.